Supreme Court, U.S.
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No. 99-1714

IN THE

Supreme Court of the United States

RONALD T. FERGUSON,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, CSX Transportation, Inc., is a wholly owned subsidiary of CSX Corporation which is publicly traded.

TABLE OF CONTENTS

	Page
Statement Pursuant To Rule 29.6	i
Table Of Contents	ii
Table Of Cited Authorities	iii
Reasons For Denying The Writ	1
I. The District Court, And The Court Of Appeals, Applied The Proper Legal Standards In Reaching Their Decisions And Petitioner's Asserted Error Consists Of Nothing More Than A Disagreement As To A Factual Finding.	2
A. The Standard For Summary Judgment.	2
B. The Standard For Recovery In A Negligent Infliction Of Emotional Distress Claim Under The Federal Employers Liability Act.	3
II. The Decision Of The District Court, As Affirmed By The Court Of Appeals, Represents The Application Of The Proper Rule Of Law In The Proper Manner.	5
Conclusion	8

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 2

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 2

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994) 1, 3, 4, 7, 8

Statute:

45 U.S.C. § 51 ..... 1, 4

Rules:

Fed. R. Civ. P. 56 2

Fed. R. Civ. P. 56(c) 2

REASONS FOR DENYING THE WRIT

This case presents a negligent infliction of emotional distress claim under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51. The District Court granted Respondent summary judgment after fully considering the Petitioner's arguments in opposition regarding the supposed existence of a material fact sufficient to deny summary judgment to Respondent. The District Court rejected those arguments by concluding that there was, in actuality, no genuine issue of material fact related to the critical zone of danger analysis. The District Court concluded, based on Petitioner's own sworn deposition testimony and on the affidavit of his consulting physician/expert witness, that the emotional distress that Petitioner claims he suffered was not the result of the fear of immediate physical harm from objects thrown at him (which did not hit him), but was rather the result of threats of *future* harm that were made to Petitioner and his family. For this reason, the District Court concluded that Petitioner could not satisfy the requirements of *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), for the assertion of a negligent infliction of emotional distress claim under the FELA. This determination was reviewed by the United States Court of Appeals for the Third Circuit and unanimously affirmed.

Fear of future harm caused by verbal threats of such future harm is insufficient to place Petitioner within the actionable zone of danger test enunciated by this Court in *Gottshall*, *supra*. Both the District Court, and the Court of Appeals, applied the proper legal standards in the proper manner in reaching their decisions. For these reasons, this Court should deny the Petition for a Writ of Certiorari.

I.

THE DISTRICT COURT, AND THE COURT OF APPEALS, APPLIED THE PROPER LEGAL STANDARDS IN REACHING THEIR DECISIONS AND PETITIONER'S ASSERTED ERROR CONSISTS OF NOTHING MORE THAN A DISAGREEMENT AS TO A FACTUAL FINDING.

A. The Standard For Summary Judgment.

The District Court's ruling on Respondent's Motion For Summary Judgment was based on Rule 56(c) of the Federal Rules of Civil Procedure, which provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Rule 56 mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In his Petition, Petitioner presents the question "[m]ay a court grant a motion for summary judgment in a Federal Employer's Liability Act case for the negligent infliction of emotional distress where there exists a genuine issue of material fact on the 'zone of danger test' issue. . . ."

(*See* Petition at i). Whether there exists in reality in this case any genuine issue of material fact was previously argued by Petitioner and decided against him by the District Court, which decision was unanimously affirmed by the Third Circuit. As the District Court stated in its opinion:

> Plaintiff's deposition testimony clearly reveals that the emotional distress he claims was not the result of the fear of immediate physical harm from being hit by the objects thrown over the fence by Deery, but rather by the fear of the threats of future harm which Deery was making toward plaintiff and his family.

See Petitioner's Appendix B at 10a.

Now, Petitioner asserts that this was an erroneous finding of fact concerning the cause of Petitioner's alleged emotional distress. It is undisputed, however, that the District Court applied the correct standard for the granting of summary judgment. (*See* Petitioner's Appendix B at 6a-7a). The Court of Appeals reviewed the District Court's analysis and unanimously affirmed it. A revisiting of that analysis of the factual evidence is not something that should warrant this Court's review.

B. The Standard For Recovery In A Negligent Infliction Of Emotional Distress Claim Under The Federal Employers Liability Act.

This Court, in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), set forth the legal standard to be applied when considering claims for negligent infliction of emotional distress under the FELA. In *Gottshall*, this Court held that

"an emotional injury constitutes 'injury' resulting from the employer's 'negligence' for purposes of FELA only if it would be compensable under the terms of the zone of danger test." *Id.* at 555 (*citing* 45 U.S.C. § 51). This Court defined the zone of danger test by stating that the law "limits recovery of emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in *immediate risk of physical harm by that conduct.*" *Id.* at 547-48 (emphasis supplied). This was the standard applied by the District Court in deciding Respondent's Motion for Summary Judgment, and by the Court of Appeals in reviewing the District Court's ruling granting Respondent summary judgment.

The District Court correctly stated the applicable rule of law and properly applied that rule of law to the resolution of Respondent's Motion for Summary Judgment. The Court of Appeals reviewed the District Court's analysis and unanimously affirmed it. The Petitioner herein fails to demonstrate any reason for another review of this Court's recognition of the substantial limitations on emotional distress claims, nor any reason for review of the District Court and the Court of Appeals' application of those limitations to respondent's Motion for Summary Judgment.

II.

THE DECISION OF THE DISTRICT COURT, AS AFFIRMED BY THE COURT OF APPEALS, REPRESENTS THE APPLICATION OF THE PROPER RULE OF LAW IN THE PROPER MANNER.

Both the District Court and the Court of Appeals on review were presented with an abundance of evidence that substantiated a determination that no genuine issue of material fact existed with regard to the critical zone of danger analysis, in that Petitioner's alleged emotional distress was caused by threats of future harm.

In his sworn deposition testimony, considered by the District Court and by the Court of Appeals, Petitioner repeatedly testified that the physical danger of being hit by a 2 x 4 or a stone on the day of the incident was not what caused him emotional distress. Rather, his alleged distress was caused by the threat of future harm to him and his family. At his deposition, Petitioner testified:

page 99

20 Q. But, Mr. Ferguson, your concern was that
21 Larry Deery was going to do something to you in the
22 future; is that right?
23 A. Larry Deery is very capable of doing
24 something to me in the future.

page 100

1 Q. I understand, but I'm just trying to get to
2 the basis of your concern. It was that Larry Deery
3 was going to do something to harm you one way or
4 another in the future; is that right?
5 A. Yes, sir; me, my family, somebody being
6 associated with me.
7 Q. Either you or your family?
8 A. Right. He could walk in here right now and
9 shoot you.

SA 17-18: Ferguson Dep. at 99-100.[1] In addition to the above, on several other occasions during his deposition Petitioner made it quite clear that fear of future harm was causing his distress. *See, e.g.*, SA 24: Ferguson Dep. at 138-39 (stating that the reason Petitioner does not go back to work is fear that Deery might retaliate against him); SA 24: Ferguson Dep. at 141 (stating the reason for his nervousness was fear of future retaliation); SA 32-33: Ferguson Dep. at 189-92 (stating that his problems sleeping, eating, exercising and to his family life were caused by fear of future retaliation).

At his deposition Petitioner also testified as follows:

page 98

24 Q. So back as far as the night of the 20th is

page 99

1 concerned, what your fear, your concerns, your fear
2 or concerns were as a result of what Larry Deery

1. Citations noted as "SA" refer to Respondent's Supplemental Appendix submitted to the United States Court of Appeals for the Third Circuit.

3 *said to you* that night; is that correct?
4. A. Yes Sir.

SA 17 (emphasis supplied).

Even viewed in a light most favorable to the Petitioner, it was clear to the District Court and to the Court of Appeals that what Petitioner feared — and what caused him emotional distress — did not flow from being in the zone of danger of being hit by a thrown object. What Petitioner feared — and what caused him emotional distress — was what Mr. Deery *said* to him that night, specifically the threat of future harm to him and to his family. Petitioner's own deposition testimony clearly established this. Moreover, the District Court also noted that it considered Petitioner's consulting physician/expert witness's report, and that he too recognized that Petitioner's fear stemmed from such threats of future harm. (*See* Petitioner's Appendix B at 10a).

Fear of future harm caused by verbal threats of such is insufficient to place Petitioner within the actionable zone of danger, because these threats do not place Petitioner in immediate risk of physical harm, or threaten him imminently with physical impact. The emotional distress that Petitioner claims he suffers is, therefore, not compensable under this Court's Opinion in *Gottshall*. Thus, the decisions of the District Court in granting summary judgment to Respondent, and the Court of Appeals in unanimously affirming that summary judgment represent the proper application of a properly stated and established rule of law. This case presents neither a novel issue of law, nor any conflict in existing law. Thus, this Court should deny this Petition.

CONCLUSION

After considering the relevant facts and the applicable rule of law, the District Court found that there was no genuine issue of material fact involved in the critical zone of danger analysis, and properly held that Petitioner had failed to satisfy the zone of danger test adopted by this Court in *Gottshall*. The Court of Appeals reviewed the findings of the District Court, and the application of the applicable rule of law, and unanimously affirmed the District Court. This case raises no issue which warrants this Court's Review and the Petition should be denied.

Respectfully submitted,

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